

The Nuts and Bolts of Governmental Ethics and Open Meeting Laws

WEST VIRGINIA ETHICS COMMISSION

Presented By: Theresa M. Kirk
Executive Director

The ETHICS ACT



- 1989 – New Governor, Gaston Caperton, called Special Legislative Session
 - Created the Ethics Commission
 - Passed the West Virginia Ethics Act -- W. Va. Code § 6B-1-1 et seq.



The ETHICS ACT



2005 – Governor Manchin called 1st Special Legislative Session

- Extended Statute of Limitations to two years
- Amended the Complaint review and procedures
 - Commission may initiate investigations/Complaint
 - Established the Probable Cause Review Board
- Strengthened financial disclosure
- Authorized random audits of lobbyist expense reports
- Added Code of Conduct for Administrative Law Judges to Commission's jurisdiction



ETHICS ACT AMENDMENTS

2008 & 2011



- Legislature approved changes to the Ethics Act, effective March 2008 & July 2011
- New provisions concern voting, public contracts, revolving door and financial disclosure

JURISDICTION



- **Ethics Act**
- **W. Va. Code § 61-10-15 (County Officials)**
- **Open Meetings Act**
- **ALJ Code of Conduct**
- **W. Va. Code § 18-5-1a (County School Board Eligibility)**

WV ETHICS COMMISSION



Agency Mission

1. Advice

- Informal, by telephone:

866-558-0664

2. Training

3. Investigations and Complaints



The Ethics Act



- Applies to public servants in state, county & municipal government
- Applies to executive, legislative & judicial branches
- Applies to elected and appointed officials, full & part-time employees
- Does not apply to contractors or private organizations receiving government funds

GOVERNMENTAL ETHICS

- General Principles-



- Maintain confidence in integrity and impartiality of the governmental process
- Public employees should avoid conflicts between their personal interests and their public responsibilities.

Use of Public Office for Private Gain



W. Va. Code § 6B-2-5(b)

“A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.”

Use Of Office For Private Gain



Public property belongs to the taxpayers. You may not use public resources for a private business.

Use of Office for Private Gain



- May not use public resources to conduct personal or private business
- More than a *de minimis* use of public resources violates the Act



Use of Office for Private Gain



- **Most frequently violated**
- **Generates the most inquiries and Advisory Opinion requests**

Use of Office for Private Gain



- Do not rule on matters involving an immediate family member or dependent
- Do not adjudicate matters involving your employer or business

Nepotism



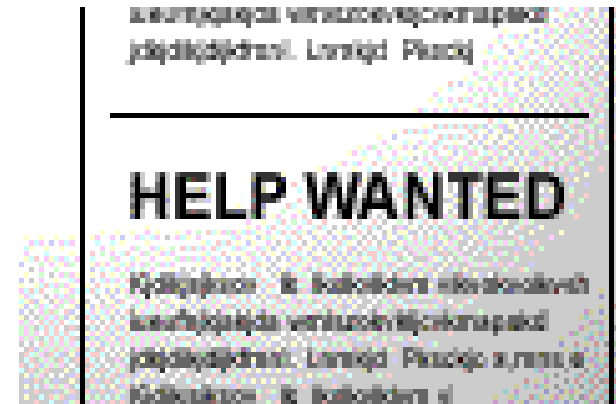
- The **Private Gain Rule** governs the hiring of immediate family members. Ethics Commission has guidelines.
- General rule – independent third party should make decision.
- But, stricter limitations for County Officials
- W.Va. Code § 61-10-15

Employment - Nepotism



W. Va. Code § 61-10-15 (ANTI-NEPOTISM)

- Prohibits employment of County Official's dependent family members (spouse or dependent children).
- Exceptions –
 - County Commission spouse – may work at county hospital
 - County official and employee get married while both in same office



Gift Limitations



- **The Ethics Act prohibits public servants from accepting gifts from interested persons, under certain circumstances.**



Gift Limitations



- **General rule – may not accept gift from an interested party in excess of \$25**
- **2008 Legislative Rule clarifies that this means \$25 from one source in a calendar year**



Gift Limitations



- No \$ \$ limit on food and beverages if host is present
- Public agencies may adopt stricter limits



Fundraising for Charity



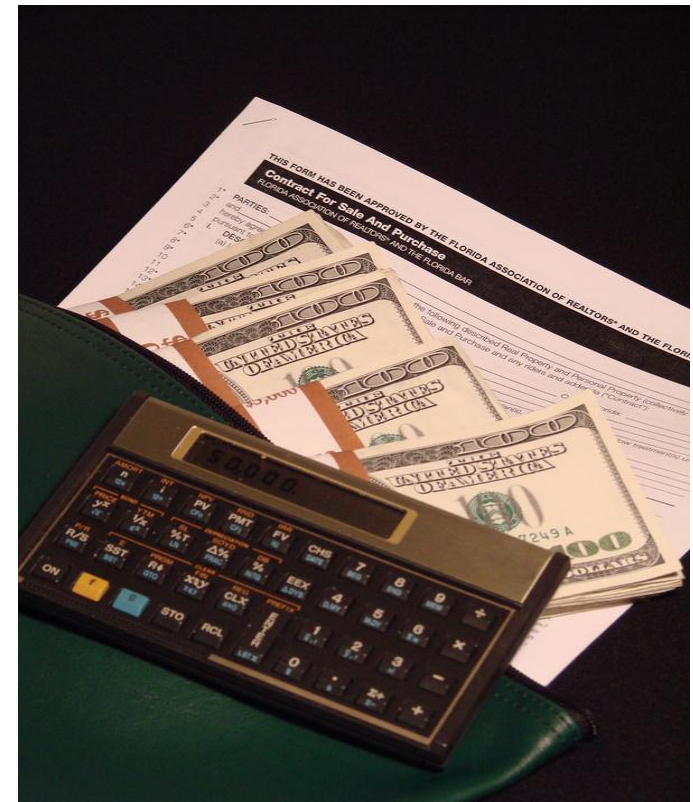
- Gifts may only be solicited for a charitable purpose, such as United Way
- May not solicit any contributions from a subordinate



Selling To Subordinates



- The Act prohibits supervisors from directly soliciting subordinates to buy from them
- Employees may purchase in response to a public advertisement



Selling To Subordinates



- **Example of permitted sale – bulletin board ad for used ATV**



Selling And Buying from Persons You Regulate



W. Va. Code § 6B-2-5(h)

- **Full-time public servants - may not seek employment with or seek to purchase or sell or lease real or personal property from any person who:**
 - (1) Had a matter on which you or a subordinate took regulatory action within the last 12 months;**
 - (2) Currently has a matter before your agency on which you or a subordinate is working.**
- **May apply for an exemption.**

Prohibited Interests in Public Contracts



W. Va. Code § 6B-2-5(d)

- Elected public officials and full-time employees may not have a financial interest in a public contract under their authority or control
- Extends to immediate family members or a business with which you or an immediate family member is associated
- Part-time appointed board member exception

Prohibited Interests in Public Contracts



W. Va. Code § 6B-2-5(d)

- **Ethics Act does not prohibit public contracts involving less than \$1,000 on an annual basis**
- **Exemptions required if contracts, individually or cumulatively, exceed \$1,000 during a calendar year**
- **Does not generally prohibit the employment of any person with any governmental body**

Prohibited Interests in Public Contracts



W. Va. Code § 6B-2-5(d)

- **Ethics Commission has discretion to grant an exemption to the public entity based upon undue hardship, excessive cost, or interference with government**
- **Contract exemptions – the governing body and public official are identified by name.**

Prohibited Interests in Public Contracts

W. Va. Code § 61-10-15



- Certain county officials may not have a financial interest in any amount in a public contract over which their public position gives them voice, influence or control
- Ethics Commission has authority to grant hardship waivers



Confidential Information



W. Va. Code § 6B-2-5(e)

“No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.”

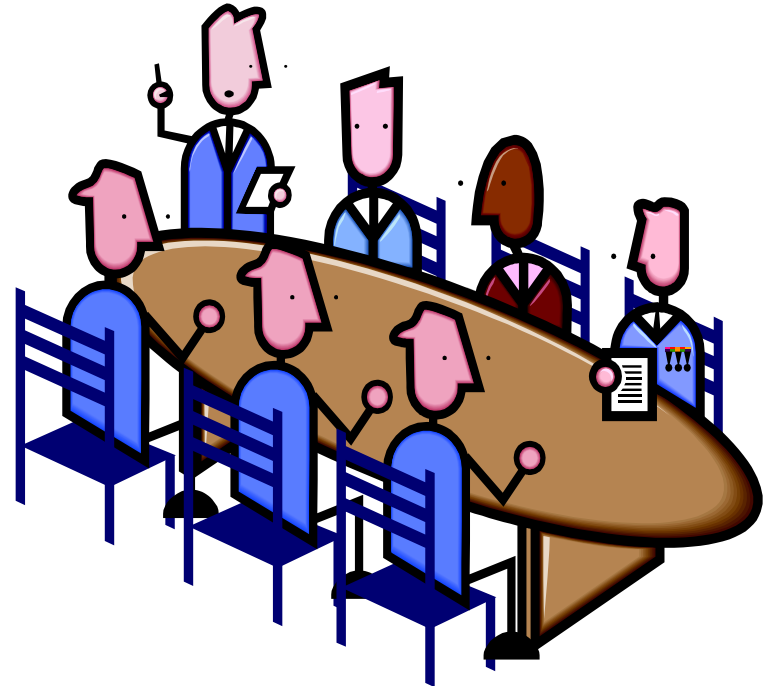


Voting

W. Va. Code § 6B-2-5(j)



- The voting rules apply to anyone who serves on a governing body of a public agency
- Includes elected, appointed, full-time and part-time officials



Voting



- **May not vote on the employment of a relative**



Voting



- “Relative” includes husband, wife, son, daughter, son-in-law, daughter-in-law, father, mother, father-in-law, mother-in-law, brother, sister, brother-in-law, sister-in-law, grandmother, grandfather, & grandchild



Voting



- **May not vote to award contract to a business with which you or an immediate family member is associated**



Voting



- **“Immediate family member” includes spouse with whom you are living, dependent children, dependent parents and dependent grandchildren**



Voting



- **You or an immediate family member are considered to have an interest in a business if:**



Voting



(1) You or an immediate family member is a director, officer, owner, employee or compensated agent of the business;

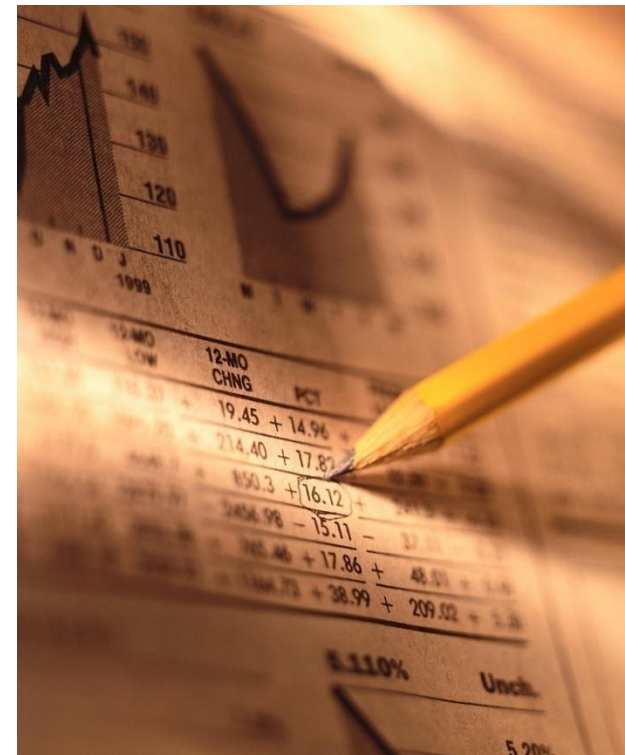
Or:



Voting



(2) You or an immediate family member owns 5% or more of the total outstanding stock of any class from that business



Enforcement



**The Ethics
Commission
enforces the Ethics
Act through the
complaint process**



Complaints and Sanctions



- Any citizen may file a complaint
- Complaints must be verified
- Complaint must be filed within 2 years
- Ethics Commission may initiate a complaint based on credible evidence that a material violation has occurred
- Complaints must allege a material violation of the Ethics Act



About the Probable Cause Review Board

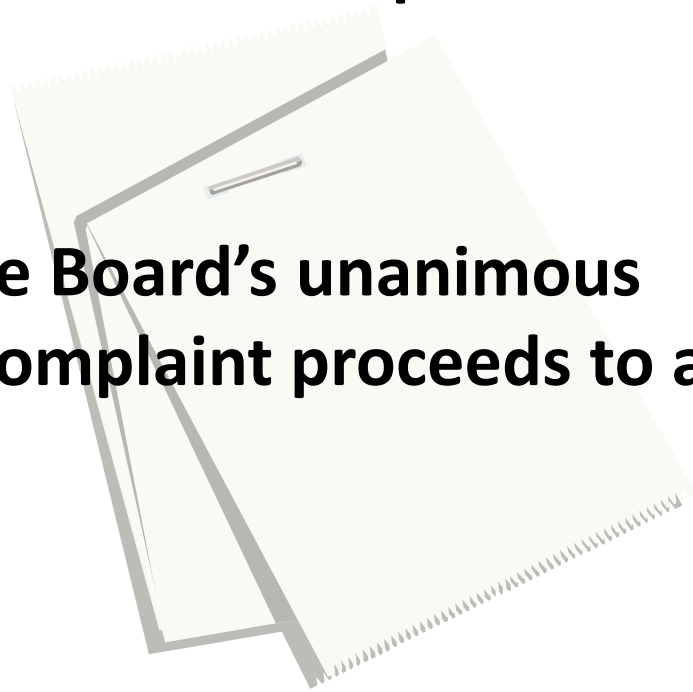


- 3 Members appointed by Governor and Approved by Senate
- Similar to a grand jury
- Proceedings are confidential unless and until Review Board enters an Order finding Probable Cause
- Review Board's work ends with Probable Cause or Dismissal

Processing Complaints



- **Complaints are initially confidential**
- **Probable Cause Review Board must accept complaint for investigation**
- **After investigation, upon the Board's unanimous finding of probable cause, complaint proceeds to a public hearing**



What Happens during Investigation Stage?



- Respondent may personally appear
- Respondent may file a written response
- Respondents may not be compelled to respond in person or in writing and failure may not be used against them
- May enter into Conciliation Agreement

Public Hearing



- **Conducted by Administrative Law Judge**
- **Open to press and public**
- **ALJ issues recommended decision**

Complaint Adjudication



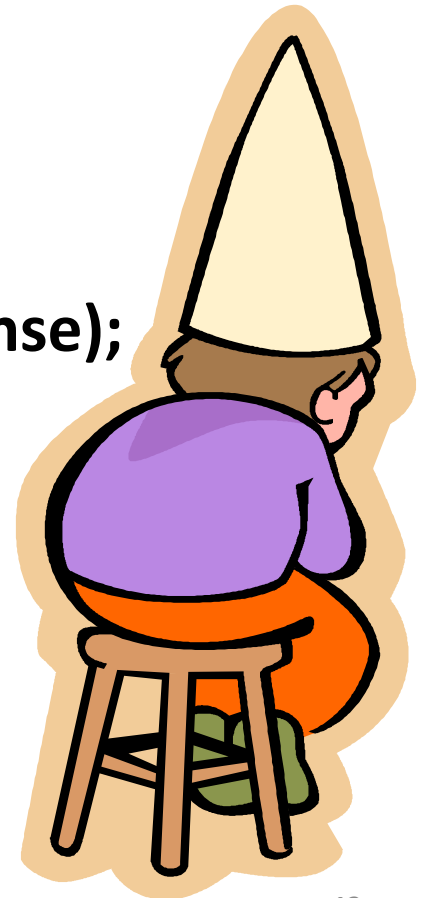
- **Entire 12-member Commission reviews ALJ's recommendation and the record established at hearing**
- **At least 7 must find guilt beyond a reasonable doubt**
- **Sanctions imposed by majority rule**

Complaints & Sanctions



Available sanctions include :

- (1) cease and desist order;**
- (2) public reprimand;**
- (3) monetary fine up to \$5,000.00 (per offense);**
- (4) order of restitution;**
- (5) costs of the investigation; and**
- (6) *recommendation* for termination of employment or removal from public office**





Revolving Door

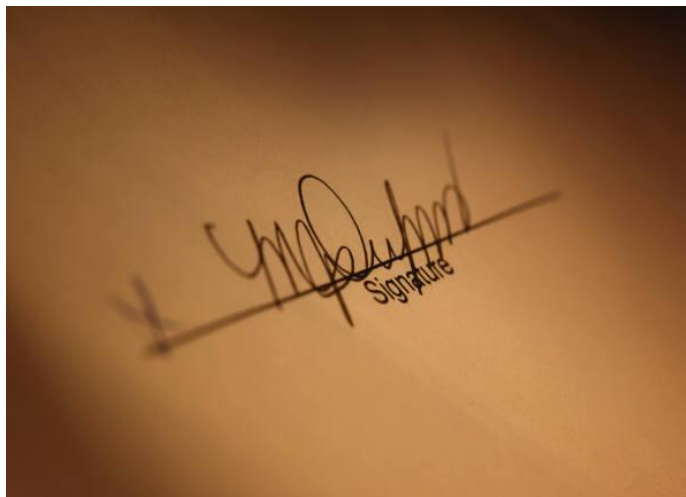
New Lobbying Limitations

- H. B. 2464 – some public servants must wait one year before registering as a lobbyist. W.Va. Code § 6B-3-2.
- (1) Members of the Legislature;
- (2) Members of the Board of Public Works;
- (3) Members of the Supreme Court of Appeals;
- (4) Will and pleasure professional employees working under the direct supervision of a Member of the Legislature;
- (5) Will and pleasure professional employees of Members of the Board of Public Works who: (a) are under their direct supervision; and, (b) regularly, personally and substantially participate in a decision-making or advisory capacity.
- (6) Secretaries of Executive Branch Departments; and,
- (7) Heads of any state departments or agencies



NEW FINANCIAL DISCLOSURE REQUIREMENTS

- H. B. 2464 – requires the disclosure of information relating to spouses.
- Exception for part-time appointed board members
 - Provided that, their spouses have no financial interests affected by the work of the board.



Advisory Opinions



- Issued by the Commission
- Discussed and approved in a public meeting
- Identity of requester/agency must be kept confidential
- Immunity granted for conduct in good faith reliance on advisory opinion

ADVISORY OPINION REQUEST

- May a vendor pay a City Manager's registration fee (>\$25) for a golf tournament at an annual conference of government officials?
- The Manager has a good relationship with the vendor, and the offer represents a gesture of good will.

ANSWER

- No! \$25 is \$25 is \$25.....
 - Even though the tournament entry fee includes lunch, the meals and beverage exception does not apply
 - No ceremonial role exception
 - OK to pay the difference, and play
 - If so, must **not** use public funds

Advisory Opinion 2008-06

ADVISORY OPINION REQUEST

- May a County Parks Commission offer free use of its recreation facilities to its employees?
- May a City offer free use of the municipal swimming pool to its employees?
- Such fringe benefits are standard in West Virginia.

ANSWER

- **Yes to both, as a fringe benefit.**
- **Conditions:**
 - **Employees' use may not interfere with public's use**
 - **Does not apply to members of the governing body**
 - **Consult attorney about tax consequences**

The Commission found that the benefits, because standard practice, make public employer competitive, and promote employee morale.

Advisory Opinions 2008-05 and 2008-07

ADVISORY OPINION REQUEST

- May the County Commission reimburse county officials and/or county employees for government calls placed on their personal cell phones?
- These individuals elect to use their personal phones in lieu of carrying an additional, government issued, cell phone.

ANSWER

- Yes, government calls only
- County may reimburse per call; or
- Flat rate not to exceed the monthly rate for the County's cell phone plan
- ⦿ Consult attorney about any potential tax consequences

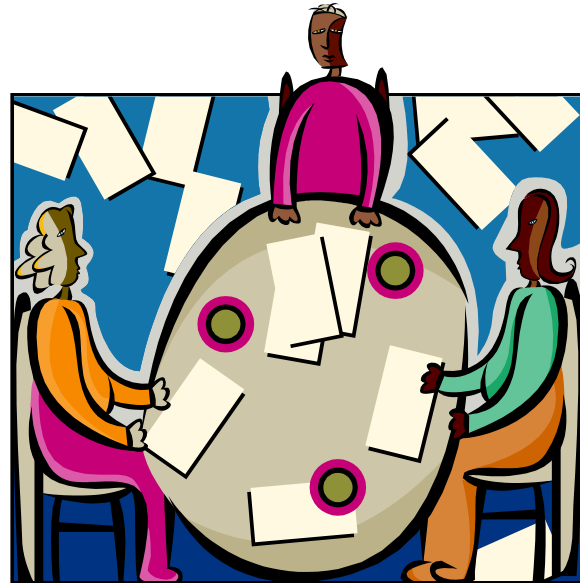
Advisory Opinion 2009-03

Open Meetings Act



**1975-- Legislature
enacted Open
Meetings Act**

**1999 – Legislature
created a Committee
within the Ethics
Commission authority
to issue formal advisory
opinions**



Open Meetings



- **Applies to governing bodies of public agencies**
- **Includes County Commission, Public Service District, City Councils, Regional Commissions, etc.**
- **Same rules apply to Committees and Subcommittees**

Open Meetings



2006 Amendment

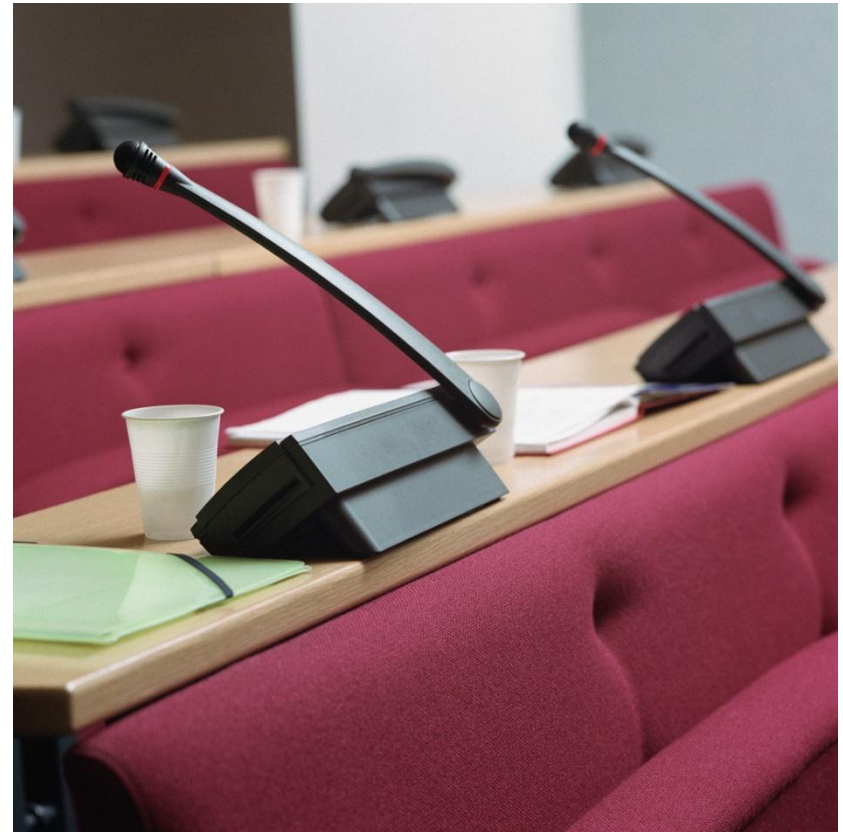
Allows good faith
reliance by other
governing bodies
with similar factual
situations



Open Meetings



Compliance requires taking certain actions before, during and after a meeting



Notice and Agenda



The Open Meetings Act requires advance notice of the date, time, and place of the meeting, and an agenda of matters to be considered.



Meeting Notice



- **State agencies – publish meeting notice in State Register 5 calendar days in advance**
- **County & municipal agencies – provide reasonable notice**
- **Regular Meetings – may follow established schedule; Special Meetings – provide 2 business days' notice**

Meeting Agenda

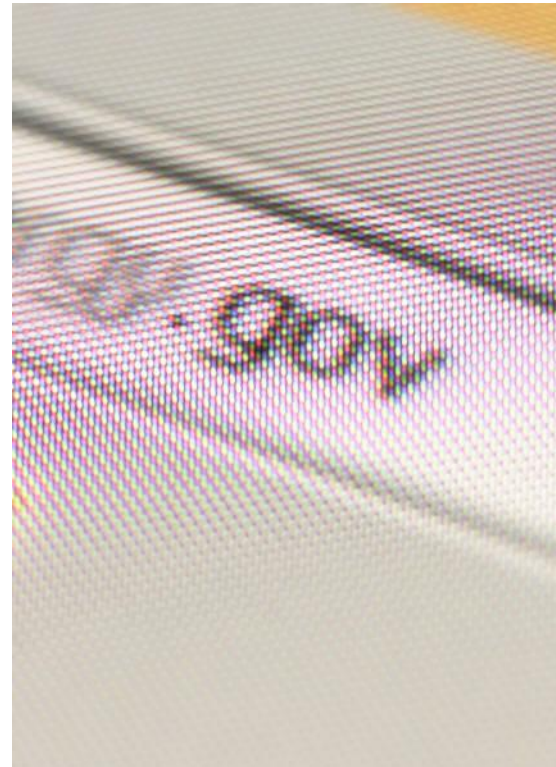


- **All governing bodies –
Issue meeting agenda 3 business days in
advance of meeting**
- **Business days do not include the day of the
meetings, weekends or legal holidays**
- **Post in public place by close of business on
day # 1**

Meeting Agenda



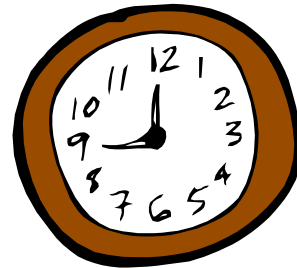
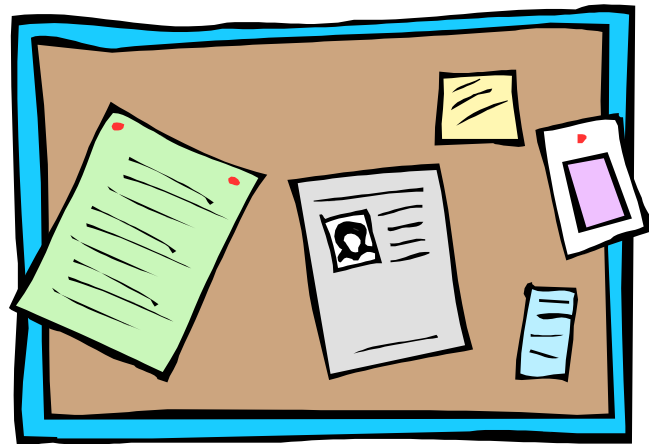
**Governing bodies
with web sites are
encouraged to post
their meeting
agendas on the
Internet**



Meeting Agenda



- Agendas need not be **published** – only **made available**
- Posting in a public place meets the minimum requirements



Meeting Agenda



- **List all items requiring official action on the agenda**
- **Official action involves anything requiring a vote of the governing body**



Meeting Procedures



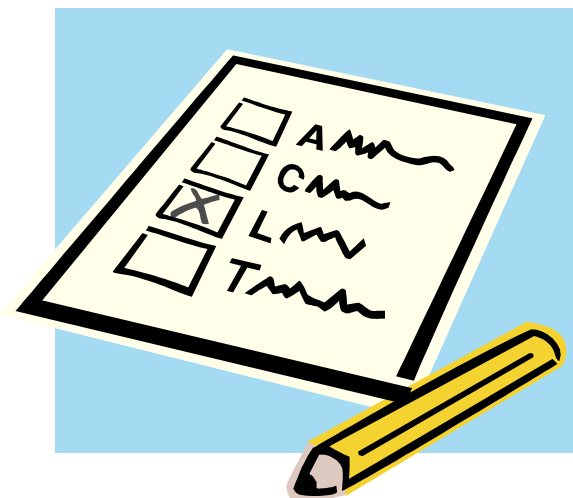
- Members may participate by telephone
- Members participating by telephone must be able to **hear** what is said by the members who are physically present
- Public present at meeting must be able to **hear** what is said over the phone



Meeting Procedures



- May not vote by secret or written ballot
- Voting must take place by verbal statement or show of hands
- No proxy voting allowed



Executive Session



- **May only go into executive session for reason permitted by Act**
- **May only go into executive session if the subject of the discussion is on the Agenda**
- **Must have motion to go into executive session identifying exemption**
- **Majority vote required to convene in executive session**

Executive Session



- **Personnel – most common exemption**
- **Hiring, firing, promoting, transfer, discipline or compensation of an employee**
- **If the subject employee requests an open session, the governing body may not conduct the discussion in executive session**

Executive Session

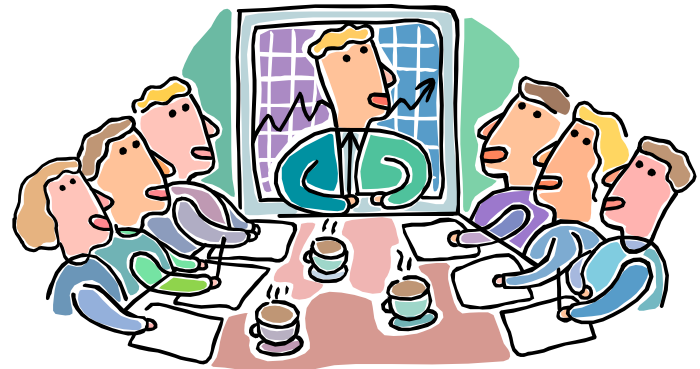


- **General personnel matters are not exempt and must be discussed in open meeting**
- **Examples: Across-the-board pay raise; supplemental health insurance; creating new positions**



Executive Session

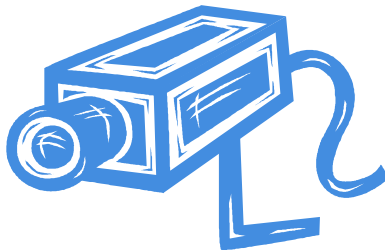
Security





Executive Session

Plan or consider an investigation relating to crime prevention or law enforcement





Executive Session

- **Commercial competition**
- **Advance construction planning**
- **Investment of public funds**





Executive Session

Attorney-client privilege

**But - may not simply
meet with attorney
to avoid discussing
matter in public**





Executive Session

**May meet in
executive session to
approve or consider
a settlement in a
lawsuit**

**Settlement terms
should be included
in minutes once
agreement is
reached**



Executive Session



- **May not enter executive session to discuss agenda item “A” and then continue to discuss agenda item “J” or some issue that is not even on the agenda**
- **May not vote in executive session**



Executive Session

- Be wary of conducting more business than necessary in executive session
- Public perception of meeting “behind closed doors”



Public Comment



- **Public comment periods are recommended, but not mandatory**
- **May not require speaker to sign up more than 15 minutes in advance**



Public Comment



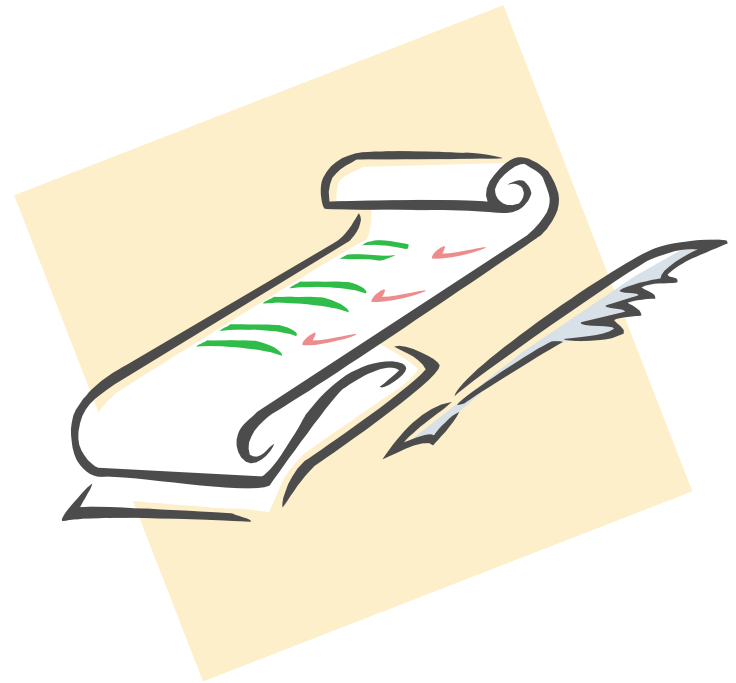
- **May set time limits for speakers**
- **If item requires official action, place on agenda for next meeting**



Meeting Minutes



- **Minutes required for all meetings**
- **Act specifies information to be included**



Meeting Minutes



- **Minutes required for all meetings**
- **State which members of governing body were present and any who were absent**
- **Show the outcome of each vote on all motions, proposals, resolutions, orders, ordinances and measures**

Meeting Minutes



- **Must identify who made each motion**
- **Not required to show who voted for or against an item unless there is a roll call vote**



Meeting Minutes



- **Minutes must be available to the public within a “reasonable time” after each meeting**
- **Committee has ruled that a “reasonable time” after each meeting means immediately following the next regular meeting, but not later than the next business day following the meeting**

Meeting Minutes



- **Minutes for executive sessions are optional**
- **No requirement to record executive session**



Violations



**Intentional violations
are a criminal
misdemeanor subject
to prosecution by the
County Prosecutor**



Violations



Even inadvertent violations may result in Circuit Court order rescinding official action and awarding attorney's fees and court costs to party who filed complaint



Robert's Rules of Order



- Does not trump, supersede or replace the OMA
 - It is a supplement to the Open Meetings Act
 - O.M.A.O. 2010-02
- Robert's Rules of Order provides guidance on parliamentary procedure during a meeting
 - It is not State law
- The OMA is a State law that mandates government entities to perform certain conduct before, during and after a meeting.

Advisory Opinions



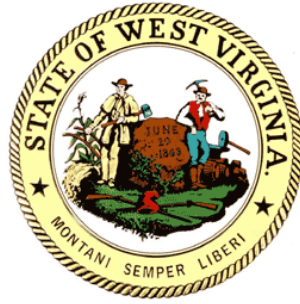
- Issued by the Commission
- Discussed and approved in a public meeting
- Name of requester/agency identified
- Immunity granted for conduct in good faith reliance on advisory opinion

Advisory Opinions



- Copies and Index of ethics and open meetings advisory opinions are on the Ethics Commission website:

www.ethics.wv.gov



WV ETHICS COMMISSION

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